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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 163

UNITED STATES STEEL CORPORATION, *Appellant,*

vs.

STATE OF WASHINGTON.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS

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Appellant, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, files this brief in opposition to the Appellee's Motion to Dismiss.

STATEMENT OF THE CASE

On page 6 of its Motion, Appellee contends that the issue of apportionment was not raised in the trial court. The issue was presented to, and argued before, the Superior Court of the State of Washington for Thurston County. Furthermore, the stipulation of facts on which the case was tried contained factual information relating to the activities of the Appellant within and outside the State of Washington which had relevance *only* to the issue of apportionment and were included in the stipulation because all parties considered the issue of apportionment to have been properly before the court. The Supreme Court of the State of Wash-

ington considered that the issue of apportionment was properly before the court and made a ruling on the merits on that issue, which ruling was adverse to the Appellant. *United States Steel Corporation v. State of Washington,* 151 Wash. Dec. 206, 202, 316 P.2d 1099, 1101 (1957).

It is true that Appellant's Complaint contained a prayer for refund of all taxes involved in the action. However, apportionment is not the only issue raised in this case. Appellant has also raised the question of the invalidity of the tax under the commerce clause because it discriminates against interstate commerce and in the event this contention is sustained by this Court, it is Appellant's position that it is entitled to a refund of all taxes.

ARGUMENT

A. Apportionment

On Pages 10 and 11 of Appellee's Motion to Dismiss it is asserted that the issue of apportionment raised here by Appellant was determined by this Court in *Field Enterprises, Inc. v. State of Washington,* 47 Wn. 2d 852, 289 P.2d 1010 (1955); affirmed 352 U.S. 806 (1936); *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951); *B. F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325, cert. den. 342 U.S. 876 (1951). Actually the issue of apportionment was not involved in any of those decisions. Those cases held that the sales in question were subject to the taxing power of the State but no ruling was made upon the constitutionality of the measure of the tax. In the privilege tax field there is

lacking a definitive expression by this Court of the obligation of each state to utilize apportoinment to limit its privilege tax to the value of the privilege conferred. A decision by this Court in the case at bar is necessary to settle this important constitutional question.

On Page 14 of the Motion to Dismiss Appellee challenges a statement made on Page 8 of the Statement as to Jurisdiction where Appellant stated:

> "If every state levied a tax such as the Washington business and occupation tax (a tax upon the privilege of engaging in business activities without regard to the extent to which those activities occur within the state) each interstate business would pay *double* the tax paid by its local competitors."

Appellant stands on the correctness of that statement.

Appellant believes that it is appropriate to assume that each state has the same tax statute as that being challenged because it is often difficult to determine whether or not a tax imposes a burden on interstate commerce because other states have different types of taxes and rarely is one comparable to another. Furthermore, if this Court is to sustain the validity of the Washington statute, it must of necessity authorize other states to enact similar statutes. If this were to occur it is Appellant's contention that duplications of the tax would be heaped upon interstate commerce. The following example clearly demonstrates this to be the fact.

Appellant, United States Steel Corporation, manufactures in California and sells in interstate commerce to Washington customers. A competitor of United

States Steel Corporation manufactures similar products in a plant in Washington and maintains a sales office in Washington to aid in the sale of its products to Washington customers. For the privilege of engaging in manufacturing and selling activities in Washington the competitor of Appellant pays only one business and occupation tax measured by the gross proceeds of its sales. Appellant on similar sales in interstate commerce to Washington customers pays one such tax measured by the gross proceeds of sales to the State of Washington and (assuming California has the same tax statute) pays a tax to California similarly measured by the gross proceeds of sale. Thus, Appellant would pay two taxes (neither of which is apportioned) for the *privilege* of engaging in the same business activities as its local competitor; and the competitor would pay only one such tax.

Apportionment of each of the taxes to reflect the value of the privilege conferred by each state would have the result of exacting from interstate commerce its fair share of all taxes but would free it from the burdens to which it is now exposed.

B. Discrimination

At Page 15 of its Motion to Dismiss, Appellee attempts to dispose of the second substantial question raised on this appeal by the contention that the issue has been determined by *B. F. Goodrich v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951), cert. den. 342 U.S. 876 (1951). Appellee misinterprets the significance of a denial of certiorari by this Court. Such denial does

not constitute an approval by this Court of the merits of the rulings made by the state court. *United States v. Shubert,* 348 U.S. 222, 228 (1955) and *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 917 (1950). Appellant does not believe that this Court intended by its denial of certiorari in the *Goodrich* case to permit a state to adopt a taxing scheme which penalizes a business only when the channels of interstate commerce are utilized in the marketing of its goods. Washington's tax statute does just that, and in its Motion to Dismiss, Appellee has made no attempt to make a contrary showing.

CONCLUSION

It is respectfully submitted that both the issue of apportionment and the issue of discrimination raised by Appellant under the commerce clause of the United State Constitution are substantial federal questions. Appellant respectfully requests that this Court enter an Order denying Appellee's Motion and noting probable jurisdiction.

Respectfully submitted,

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